BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAYMOND SCOTT MURPHY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,028,222
SCHWAN'S HOME SERVICE, INC.	)	
Respondent	)	
AND	)	
	)	
HARTFORD INSURANCE COMPANY	)	
OF THE MIDWEST	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 31, 2006 preliminary hearing Order of Administrative Law Judge John D. Clark. The Administrative Law Judge (ALJ) found that claimant had proven that he suffered accidental injury arising out of and in the course of his employment. Respondent was ordered to provide the names of three physicians from which claimant would select a treating physician. Claimant was awarded temporary total disability compensation (TTD) beginning February 13, 2006, and respondent was ordered to pay claimant's past medical expenses.

ISSUES

Respondent argues that claimant failed to prove that he suffered an accidental injury arising out of and in the course of his employment and that claimant failed to provide timely notice of that accident. Respondent also disputes claimant's right to TTD as a result of this alleged accident. Those are the issues to be considered by the Appeals Board (Board) on this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Board finds the Order of the ALJ should be affirmed.

Claimant worked in respondent's warehouse when, on February 2, 2006, a co-worker threw a box to him, which claimant caught and slid into a slot. Claimant alleges that when he caught that box, he felt a sharp pain in his midsection and low back. He described it as feeling like "a groin pull or an overextension."[1] Claimant did not initially consider this to be a significant problem, believing that he had only overextended. Claimant finished his shift that day. He was next scheduled to work on Sunday, February 5, but called in sick, telling J. T. Penner, respondent's depot manager, that he was "hurting" and needed a couple of days off.[2] Claimant next worked on February 9 and completed his shift, although he testified that he was on pain medication at the time.

Claimant's history is significant in that he suffered prior injuries to his back. Claimant was a wrestler and weightlifter and was injured in high school and again in December 2004. An MRI performed February 25, 2005, displayed small, subligamentous disk herniations at L4-L5 and L5-S1. The L4-5 disk also demonstrated an annular tear. Likewise, an MRI done on May 25, 2005, displayed a mild central bulge at L4-5 and L5-S1. On this report, the annular tear was located at L5-S1 and described as tiny.[3] However, even with these preexisting conditions, claimant was able to pass a physical agility test and a DOT physical prior to beginning his employment with respondent.

Claimant was under the care of Florante R. Mancao, M.D., before beginning his employment with respondent. Dr. Mancao's medical notes, while difficult to read, indicate that claimant was being treated for back pain as early as September 7, 2004. The doctor's notes indicate a diagnosis of lumbago.[4] Claimant missed his scheduled appointment with Dr. Mancao on February 6, 2006, with no explanation. The note dated February 9, 2006, indicates lumbago. The office note of March 1, 2006, discusses the accident involving the box, which is described as a 60-pound box of frozen food. The note indicates the accident happened at work.

When claimant first advised Mr. Penner of his problems, claimant indicated he thought he had kidney stones, a condition that claimant had experienced before.[5] However, claimant testified that later he told Mr. Penner that his condition was from a work-related injury, with that conversation occurring on either February 9 or 10. Mr. Penner

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[1] Murphy Depo. at 27.

[2] *Id*. at 33-34.

[3] P.H. Trans., Resp. Ex. 3.

[4] *Id*., Resp. Ex. 3.

[5] According to Mr. Penner, that conversation occurred on February 5, 2006. (See P.H. Trans. at 45-46.)

remembers that conversation occurring on February 23, 2006, well beyond the 10 days allowed under K.S.A. 44-520 for notice to an employer of an accident.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[6]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[7]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[8]

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.

In this instance, claimant's testimony would normally be sufficient to satisfy his burden of proof regarding whether he suffered an accidental injury arising out of and in the course of his employment, and whether he provided timely notice of his accident. However, other evidence in the record calls into question claimant's credibility. The medical information in evidence, as well as Mr. Penner's testimony, raises doubts regarding the accuracy of claimant's testimony.

In these situations, an administrative law judge's ability to observe, in person, the testimony of witnesses provides an opportunity to assess the credibility of those witnesses. Here, the ALJ was able to observe both the claimant and Mr. Penner at the preliminary hearing. Because of that, the Board gives some credence to the ALJ's opinion. This ALJ found claimant had satisfied his burden, for preliminary hearing purposes, of proving that he had suffered an accidental injury arising out of and in the course of his employment and that claimant had provided timely notice of that accident. The Board, by the barest of margins, affirms those findings.

Respondent also disputes claimant's right to TTD.

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[6] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[7] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[8] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[9]

Disputes regarding whether a claimant is temporarily and totally disabled are well within an administrative law judge's jurisdiction at a preliminary hearing. The Board does not take jurisdiction of the TTD issue on appeal from a preliminary hearing. Therefore, respondent's appeal on that issue is dismissed.

As provided by the Act, these findings are not binding upon a full hearing on the claim but shall be subject to a full presentation of the facts.[10]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated May 31, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September, 2006.

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier

[9] K.S.A. 44-534a(a)(2).

[10] K.S.A. 44-534a(a)(2).